

No. 16-1077

In The
Supreme Court of the United States

BAY POINT PROPERTIES, INC.
f/k/a BP PROPERTIES, INC.,

Petitioner,

v.

MISSISSIPPI TRANSPORTATION COMMISSION and
MISSISSIPPI DEPARTMENT OF TRANSPORTATION,

Respondents.

**On Petition for a Writ of Certiorari
to the Supreme Court of Mississippi**

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The court below invited legislatures to convert highway easements into parks, road easements into subways, and utility easements into stadiums, without justly compensating property owners. In Respondents' view, the jury had to pretend Petitioner's land was encumbered by the very highway easement the jury had already determined was not being used for a highway purpose; justly compensating Petitioner would represent "a windfall." BIO 10. Their argumentative excess demonstrates exactly what went wrong below: the court required the jury to ignore reality, and allowed a statute to override the Just Compensation imperative. This Court should not do the same.

Statutory abandonment cannot govern just compensation guaranteed by the Fifth Amendment. The remedy sought here is revealing: Petitioner didn't seek ejectment—merely compensation for the taking. This distinction is critical. Mississippi's statute may allow Respondents to remain on the land because they have not formally abandoned their limited-use highway easement, despite converting it to an admittedly different, non-highway use and discontinuing the Toll Project No. 1 bridge. The Just Compensation Clause—not Mississippi's abandonment statute—controls, however, and requires full compensation once Respondents did so.

Respondents concede they were only authorized to use Petitioner's property according to Toll Project No. 1's "plans and specifications." App. 3. They also acknowledge "a portion of the highway easement used for the bridge landing was converted into a park and parking lot." BIO 1. They concede the jury found

these new uses were not highway purposes, and that the jury concluded Respondents took Petitioner's property. BIO 3. Yet, they argue, "the continued use of the easement by Respondents for a public purpose does not equate to abandonment," meaning that compensation was measured as if the land continued to be subject to a highway use, even though it was not. BIO 2. This circumvents the issue, because just compensation isn't limited by abandonment under section 65-1-123, but is measured by what was actually taken—Petitioner's right to use its property, unencumbered by anything but Toll Project No. 1.

Respondents have no answer, except to assert Petitioner did not raise and the courts below did not pass upon, this claim. Their objection fails to withstand even modest scrutiny. Petitioner raised the claim on the first page of its brief below, and the court considered it. *See* App. 15. Respondents alternatively assert the constitutional claim is inconsequential. They offer no reason for the Court to deny review of the important question of whether a state's ability to supersede its common law of property also allows it to limit the amount of compensation it must pay for resulting takings. In suggesting the decision below poses no issue worthy of review, Respondents disregard the contrary view of property scholars, national public interest and property rights organizations, and property owners who have been subject to similar tactics, all of whom filed amicus briefs.¹ As amici underscore, this case presents an important

¹ Twelve amici have filed three briefs in support of the petition, including a brief joined by Professor James W. Ely, Jr., co-author of the leading easement treatise, cited by the dissent.

opportunity to reaffirm the principles of *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1892), and clarify that Mississippi may redefine its property law, but may not avoid its duty under the Just Compensation Clause to provide the full extent of what Petitioner lost when Respondents openly and notoriously put an easement which had been granted only for Toll Project No. 1 to different uses. Converting an easement for a limited highway purpose into a general servitude for an indefinite period, as Respondents unabashedly trumpet, certainly qualifies as a fully compensable taking.

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ARGUMENT

I. THE JUST COMPENSATION CLAIM IS PRESERVED AND WARRANTS IMMEDIATE REVIEW

A. Petitioner Raised—And The Court Below Passed Upon—The Constitutional Claim

Respondents are spectacularly wrong when they assert Petitioner did not raise the Fifth Amendment claim below. BIO 5. To the contrary, the *main* issue argued by Petitioner in the Mississippi Supreme Court was whether the Just Compensation Clause required the taken property be valued unencumbered by the highway-purpose easement which the jury determined was not being used by Respondents for the granted highway purpose. Petitioner repeatedly raised this claim, starting with the first page of its brief below.² Respondents countered these arguments

² Appellant’s Brief at 1 (June 26, 2015) (“[w]hether the jury erred in awarding the nominal sum of \$500 to Bay Point for the
(footnote continued on next page)”)

in their brief, belying their assertion here the claim was not properly presented and considered below.³ Petitioner also raised the issue in the trial court by submitting instructions to have the jury value the land without regard to whether Respondents abandoned the easement under section 65-1-123. App. 49-50, 52. Consequently, the majority below addressed Petitioner's claim:

If the easement continued to exist, compensation due to Bay Point would be the value of the property, subject to the easement. If the easement no longer existed, compensation due to Bay Point would be the value of the property, unencumbered by the easement. The jury was presented with only two values: an encumbered value of between \$100 and \$500, and an unencumbered value of \$26 per square foot. The jury determined the easement continued to exist and awarded Bay Point \$500.

taking of its 14.34 acres by Appellees . . . for public use instead of awarding just compensation as mandated by the Takings Clause[] of the Fifth Amendment of the U.S. Constitution . . . when the jury found Bay Point prevailed on its inverse condemnation claim?"). *See also id.* at 12 ("As a result, Defendants' subsequent occupation of the Property for public use was a total take, which entitled Bay Point to just compensation for the Property, unencumbered by the Easement, under the Takings Clauses of the [U.S. and Mississippi] Constitutions.").

³ *See* Appellees' Brief at 13-16 (Sep. 23, 2015) (arguing that *Preseault v. United States*, 100 F.3d 1425 (Fed. Cir. 1996), "does not stand for the proposition that the use of a highway easement which is arguably inconsistent with a highway purpose has the same effect as abandonment, requiring payment for the unencumbered value of property").

App. 15. This Court’s “traditional rule” permits a grant of certiorari where the question presented has been “pressed or passed upon below.” *United States v. Williams*, 504 U.S. 36, 41 (1992); *see also* Stephen M. Shapiro *et al.*, *Supreme Court Practice* 464–65 (10th ed. 2014).

In the face of the fact that Petitioner raised the Just Compensation Clause claim below, Respondents narrow their argument, asserting Petitioner “did not challenge the constitutionality of Mississippi Code Annotated § 65-1-123[,]” and “the validity of the statute was never ‘drawn into question’ by the majority of the State Court.” BIO 4. But drawing the statute’s validity into question was not the remedy Petitioner sought below, nor is it here: Mississippi’s “abandonment” statute may be perfectly valid as an expression of Mississippi law, and Petitioner did not seek to invalidate the statute or eject Respondents from the land. Petitioner simply sought the full and perfect equivalent for what it lost when Toll Project No. 1 (the only authorized use) was discontinued and Petitioner’s property was impressed into public service as a park and different bridge. *United States v. Twin City Power Co.*, 350 U.S. 222, 228 (1956) (Fifth Amendment measures the loss to the owner, not the gain to the taker).

Respondents also make too much of the majority’s statement that “the dissent raises arguments not presented to the trial court.” App. 12-13. The dissent concluded at paragraphs 41 and 42 that Respondents could not rely on the abandonment statute because it was adopted in 1988, well after the 1952 grant of the highway easement, and would be “a *separate* ground for finding a governmental taking.” App. 26-27 (em-

phasis added). The dissent also urged consideration of a “separation of powers” argument. App. 27. Petitioner is “not limited to the precise argument . . . made below.” *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). These are not new *claims*, but simply *arguments* “to support what has been [Petitioner’s] consistent claim: that” a statute which deems highway-purpose easements abandoned only when Respondents formally do so, cannot prevent Petitioner from recovering full compensation for the loss of its fee simple interest, the consequence of Respondents’ discontinued use of the highway-purpose easement and conversion of the property to a public park. *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Ultimately, it is irrelevant whether Petitioner made these two specific arguments below, because its claim for just compensation here does not turn on either rationale.

Petitioner raised the Just Compensation claim below, and squarely presents it to this Court.

B. The Issue Is Primed For Review

The question presented isn’t *sui generis*. BIO 6. Quite the opposite. It lies at the very heart of the continuing debate over the relationship between state regulatory power and the Bill of Rights. This issue—the power of state legislatures and courts to define and redefine “property” without triggering the duty to pay just compensation—has repeatedly drawn the attention of this Court,⁴ property owners and govern-

⁴ See, e.g., *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring) (“Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general
(footnote continued on next page)

ment regulators, and legal scholars.⁵ Most recently, this Court grappled with these issues during the oral arguments in *Murr v. Wisconsin*, No. 15-214 (Mar. 20, 2017).⁶ Granting this petition would add clarity to an area of Fifth Amendment law that desperately needs it.

Respondents claim (BIO 8) the decision below does not conflict with *Monongahela*, because that case only

way.”); *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) (“Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”); *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl Protection*, 560 U.S. 702, 713 (2010) (noting “[s]tates effect a taking if they recharacterize as public property what was previously private property”).

⁵ A cursory internet search for “background principles of state law” reveals myriad scholarly articles on the issue. See <http://bit.ly/2pwzaVS>.

⁶ See Transcript at 11 (“So why isn’t that background state law that would—would apply?”) (Ginsburg, J.); *id.* at 16-17 (“If we’re looking to State law, let’s look to State law, the whole ball of wax.”) (Kagan, J.); *id.* at 22 (“the issue is how much weight should we be giving to the State boundary lines, the State property lines”) (Sotomayor, J.); *id.* at 31-33 (colloquy between Chief Justice Roberts and counsel about state law defining property under the Fifth Amendment); *id.* at 34 (“[Y]ou’re talking just about State law. It seems to me that your position is as wooden and as vulnerable a criticism as—as the Petitioner’s. You say, whatever State law—basically you’re saying, whatever State law does, that defines the property.”) (Kennedy, J.); *id.* at 36 (“And then this new regulation is adopted and now the side lot can’t be sold at all. And they say: Well, look, you’ve taken away this valuable asset we were going to use for our retirement.”) (Alito, J.); *id.* at 37-38 (colloquy between Justices Kennedy, Alito, and counsel on effect of state property law).

addressed situations where a legislature interferes with the judicial compensation function by imposing a “prospective conjectural advantage.” We have two responses. *First*, the Court itself made clear the Fifth Amendment’s proscription on legislative incursions into the province of the courts was not so restrictive: quoting the Mississippi Supreme Court, this Court noted the Fifth Amendment prohibits a state legislature from interfering with the right of “full and perfect” compensation “by prospective conjectural advantage, or in any manner to interfere with the just powers and province of courts and juries in administering right and justice[.]” *Monongahela*, 148 U.S. at 327 (emphasis added) (quoting *Isom v. Mississippi Cent. R.R.*, 36 Miss. 300, 315 (1858)). *Second*, the “prospective conjectural advantage” argument seems to be that the Mississippi legislature could avoid its duty of just compensation when the state uses highway easements for non-highway uses, as long as it was not transparently attempting to avoid paying full compensation in a specific case. This contravenes *Lucas*, which rejected the argument that legislatures may alter common law principles to avoid or minimize compensation, as long as a landowner was not singled out by legislative proscription. *Lucas*, 505 U.S. at 1010, 1026, 1029.

Nor do Respondents dispute that under Mississippi’s common law—which is consistent with the law of virtually every other jurisdiction—the discontinuance of the Toll Project No. 1 bridge and conversion of the land to a public park would have resulted in Petitioner regaining exclusive, unencumbered fee simple pos-

session of its property. *See* Pet. 7-8, 16 & n.3.⁷ Respondents also have no answer to the petition’s citation of cases which—contrary to the court below—concluded that just compensation must be measured in these cases by comparing the actual present use of the property with its value in its unencumbered state, and that a statute cannot alter this essential formula. Pet. 17-19 (conflict with Federal Circuit), Pet. 23-29 (conflict with Court of Federal Claims), Pet. 30-31 (conflict with other states).

C. This Case Is An Excellent Vehicle

The facts have been conclusively determined and are not subject to change. The jury found that use of Petitioner’s land was not a highway use, including its use as Henderson Point Community Park. It also concluded Respondents inversely condemned Petitioner’s property and owed compensation. The Mississippi Supreme Court affirmed. App. 19 (Petitioner prevailed on a takings claim, so trial court was “manifestly wrong” to deny attorneys’ fees). The only thing forcing the jury to award a nominal \$500 rather than the full, uncontested value of Petitioner’s land was section 65-1-123. App. 15 (“[t]he jury was presented with only two values: an encumbered value between \$100 and \$500, and an unencumbered value of \$26 per square foot.”). The sole reason the court below af-

⁷ For a very recent example of this principle, see *Barfield v. Sho-Me Power Elec. Coop.*, No. 15-2964 (8th Cir. Mar. 29, 2017) (easement granted for “electric transmission line” did not allow grantee to install fiber-optic cables for internet service and sell excess bandwidth; new use triggered inverse condemnation claim and required just compensation).

firmed the award of a nominal \$500 was the lack of abandonment under the statute.

The decision below is a definitive interpretation of state law by Mississippi's highest court. Consequently, there is no chance that a different interpretation of state law could moot the federal constitutional issue. *Cf. Expressions Hair Design v. Schneiderman*, No. 15-1391, slip op. at 9 (Mar. 29, 2017) (Sotomayor, J., and Alito, J., concurring) (federal courts should certify uncertain questions of state law to state courts). The federal constitutional issue is narrowly drawn, and cleanly presented.

II. USE OF PETITIONER'S PROPERTY FOR ANYTHING OTHER THAN TOLL PROJECT NO. 1 TRIGGERED THE RIGHT TO JUST COMPENSATION

Respondents argue the Mississippi legislature can change common law rules on how easements are abandoned. BIO 8-9 ("the statute in question here was passed to supersede Mississippi common law tenets regarding abandonment of easements"). With that, Petitioner has no quarrel. Where Respondents go wrong is arguing (BIO 15-17) that supersession of the common law dictated the valuation of Petitioner's property under the Just Compensation Clause even after the jury concluded Respondents were no longer using the highway easement for Toll Project No. 1, and had put the easement to other non-highway uses. *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 22 (1990) (Justices O'Connor, Scalia, and Kennedy, concurring) (state law defines property but that "is an issue quite distinct from whether the Commission's exercise of power over matters within its jurisdiction effected a taking of petitioners' property") (citing *Kai-*

ser Aetna v. United States, 444 U.S. 164, 174 (1979)). In other words, because of Mississippi's abandonment statute, Petitioner could not stop conversion of the highway easement into a community park. But this had no impact on Respondents' duty to provide full compensation for the taking.

Respondents argue their current use of the highway easement as a park *is* a highway use, simply because they have not statutorily abandoned the easement. BIO 2 ("The continued use of the easement by Respondents for a public purpose does not equate to abandonment."). This argument is *ipse dixit*. *Pre-seault*, 494 U.S. at 23 (O'Connor, J., concurring) ("[A] sovereign, 'by *ipse dixit*, may not transform private property into public property without compensation. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.") (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)).

It also contradicts reality, and the conclusions of both the jury and all nine Mississippi justices. The jury rejected Respondents' claim that a park and other present uses are highway uses, when it selected the second option in Instruction No. D-7A and determined the "use being made of the property in this case is not a highway purpose." App. 45-46; Pet. 9-10. The court below affirmed. Respondents insist we ignore the jury's finding, and instead focus only on the abandonment procedures in a self-serving statute.

The Just Compensation Clause checks such abuses by ensuring the economic burdens of a public good such as Henderson Point Community Park are shared among all who benefit, and are not focused on a single owner. Statutory abandonment cannot limit compensation after the jury determined Respondents

actually changed use. Just Compensation is solely a function of the Fifth Amendment.

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CONCLUSION

The petition should be granted.

Respectfully submitted.

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